

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

BEFORE THE COURT are cross-Motions for Summary Judgment (Ct. Rec. 13, 15.) Attorney Jeffrey Schwab represents Plaintiff; Special Assistant United States Attorney Richard M. Rodriguez represents Defendant. The parties have consented to proceed before a magistrate judge. (Ct. Rec. 8.) After reviewing the administrative record and briefs filed by the parties, the court **GRANTS** Plaintiff's Motion for Summary Judgment, and remands the matter to the

¹ As of February 12, 2007, Michael J. Astrue became Commissioner of Social Security. Pursuant to FED. R. CIV. P. 25(d)(1), Commissioner Michael J. Astrue should be substituted as Defendant, and this lawsuit proceeds without further action by the parties. 42 U.S.C. § 405 (g).

1 Commissioner for additional proceedings.

2 **JURISDICTION**

3 On October 31, 2002, plaintiff Ryan Oshiro (Plaintiff)
4 protectively filed his applications for disability insurance
5 benefits and Social Security Income benefits. (Tr. 59.) Plaintiff
6 alleged disability due to chronic depression, attention deficit
7 disorder and agoraphobia, with an onset date of June 30, 2000. (Tr.
8 56, 76, 365.) Benefits were denied initially and on
9 reconsideration. (Tr. 28, 34.) Plaintiff requested a hearing
10 before an administrative law judge (ALJ), which was held before ALJ
11 John Hood on February 15, 2005. (Tr. 381-97.) Plaintiff, who was
12 present and represented by counsel, testified briefly. (Tr. 383.)
13 Medical expert W. Scott Mabee, Ph.D., testified; vocational expert
14 Jill Dempsey appeared, but did not testify. (Id.) The ALJ denied
15 benefits and the Appeals Council denied review. (Tr. 6.) The
16 instant matter is before this court pursuant to 42 U.S.C. § 405(g).

17 **STATEMENT OF THE CASE**

18 The facts of the case are set forth in detail in the transcript
19 of proceedings, and are briefly summarized here. At the time of the
20 hearing, Plaintiff was 50 years old and had a high school education.
21 (Tr. 82.) He had never been married and had no children. (Tr.
22 239.) He had past relevant work as a book store manager, cook, and
23 landscaper and nursery worker. (Tr. 77.) He had a history of heavy
24 marijuana abuse, as well as extremely heavy cocaine and
25 methamphetamine abuse. (Tr. 239-40, 271, 278.) Medical records
26 indicate his first and only substance abuse treatment took place in
27 2004. (Tr. 277, 355.)

ADMINISTRATIVE DECISION

At step one, ALJ Hood found Plaintiff had not engaged in substantial gainful activity during the relevant time. (Tr. 20.) At step two, he found Plaintiff had the severe impairment of chronic depression, but determined at step three that it did not meet or medically equal one of the listed impairments in 20 C.F.R., Appendix 1, Subpart P, Regulations No. 4 (Listings). (Id.) The ALJ found Plaintiff's allegations regarding his limitations were not totally credible. (Tr. 20.) At step four, he determined Plaintiff had a residual functional capacity (RFC) of no physical limitations, but "he should have limited contact with the public, and few changes in his routine or workplace." (Id.) The ALJ concluded Plaintiff could perform his past relevant work as a cook or nursery worker as performed and as generally performed in the national economy. (Tr. 20.) The ALJ determined Plaintiff was not disabled "even when his drug and alcohol abuse is considered" at any time through the date of his decision. (Id.) He also found Plaintiff's substance abuse, in remission, was "not a contributing factor material to the determination of disability." (Tr. 21.)

STANDARD OF REVIEW

In *Edlund v. Massanari*, 253 F.3d 1152, 1156 (9th Cir. 2001), the court set out the standard of review:

A district court's order upholding the Commissioner's denial of benefits is reviewed *de novo*. *Harman v. Apfel*, 211 F.3d 1172, 1174 (9th Cir. 2000). The decision of the Commissioner may be reversed only if it is not supported by substantial evidence or if it is based on legal error. *Tackett v. Apfel*, 180 F.3d 1094, 1097 (9th Cir. 1999). Substantial evidence is defined as being more than a mere scintilla, but less than a preponderance. *Id.* at 1098. Put another way, substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to

1 support a conclusion. *Richardson v. Perales*, 402 U.S.
 2 389, 401 (1971). If the evidence is susceptible to more
 3 than one rational interpretation, the court may not
 4 substitute its judgment for that of the Commissioner.
Tackett, 180 F.3d at 1097; *Morgan v. Commissioner of*
Social Sec. Admin., 169 F.3d 595, 599 (9th Cir. 1999).

5 The ALJ is responsible for determining credibility,
 6 resolving conflicts in medical testimony, and resolving
 7 ambiguities. *Andrews v. Shalala*, 53 F.3d 1035, 1039 (9th
 8 Cir. 1995). The ALJ's determinations of law are reviewed
 9 *de novo*, although deference is owed to a reasonable
 10 construction of the applicable statutes. *McNatt v. Apfel*,
 201 F.3d 1084, 1087 (9th Cir. 2000).

11 SEQUENTIAL PROCESS

12 Also in *Edlund*, 253 F.3d at 1156-1157, the court set out the
 13 requirements necessary to establish disability:

14 Under the Social Security Act, individuals who are
 15 "under a disability" are eligible to receive benefits. 42
 16 U.S.C. § 423(a)(1)(D). A "disability" is defined as "any
 17 medically determinable physical or mental impairment"
 18 which prevents one from engaging "in any substantial
 19 gainful activity" and is expected to result in death or
 20 last "for a continuous period of not less than 12 months."
 21 42 U.S.C. § 423(d)(1)(A). Such an impairment must result
 22 from "anatomical, physiological, or psychological
 23 abnormalities which are demonstrable by medically
 24 acceptable clinical and laboratory diagnostic techniques."
 25 42 U.S.C. § 423(d)(3). The Act also provides that a
 26 claimant will be eligible for benefits only if his
 27 impairments "are of such severity that he is not only
 28 unable to do his previous work but cannot, considering his
 age, education and work experience, engage in any other
 kind of substantial gainful work which exists in the
 national economy. . . ." 42 U.S.C. § 423(d)(2)(A). Thus,
 the definition of disability consists of both medical and
 vocational components.

23 In evaluating whether a claimant suffers from a
 24 disability, an ALJ must apply a five-step sequential
 25 inquiry addressing both components of the definition,
 26 until a question is answered affirmatively or negatively
 27 in such a way that an ultimate determination can be made.
 28 20 C.F.R. §§ 404.1520(a)-(f), 416.920(a)-(f). "The
 claimant bears the burden of proving that [s]he is
 disabled." *Meanel v. Apfel*, 172 F.3d 1111, 1113 (9th Cir.
 1999). This requires the presentation of "complete and
 detailed objective medical reports of h[is] condition from
 licensed medical professionals." *Id.* (citing 20 C.F.R. §§

1 404.1512(a)-(b), 404.1513(d)).

2 It is the role of the trier of fact, not this court, to resolve
3 conflicts in evidence. *Richardson*, 402 U.S. at 400. If evidence
4 supports more than one rational interpretation, the court may not
5 substitute its judgment for that of the Commissioner. *Tackett*, 180
6 F.3d at 1097; *Allen v. Heckler*, 749 F.2d 577, 579 (9th Cir. 1984).
7 Nevertheless, a decision supported by substantial evidence will
8 still be set aside if the proper legal standards were not applied in
9 weighing the evidence and making the decision. *Browner v. Secretary*
10 *of Health and Human Services*, 839 F.2d 432, 433 (9th Cir. 1988). If
11 there is substantial evidence to support the administrative
12 findings, or if there is conflicting evidence that will support a
13 finding of either disability or non-disability, the finding of the
14 Commissioner is conclusive. *Sprague v. Bowen*, 812 F.2d 1226, 1229-
15 1230 (9th Cir. 1987).

16 ISSUES

17 The question is whether the ALJ's decision is supported by
18 substantial evidence and free of legal error. Plaintiff argues the
19 ALJ erred in finding Plaintiff's mental impairments were not
20 disabling. (Ct. Rec. 13 at 5.) Plaintiff asserts the ALJ
21 improperly evaluated the medical evidence and challenges the ALJ's
22 credibility finding. (Id. at 8.)

23 DISCUSSION

24 A. Credibility

25 In his sequential evaluation, the ALJ found Plaintiff was "not
26 credible" and discounted his statements concerning symptoms and
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1 limitations.² (Tr. 19.) In *Thomas v. Barnhart*, 278 F.3d 947, 958-
2 959 (9th Cir. 2002), the court noted when the ALJ finds the
3 claimant's statements as to the severity of impairments and
4 limitations is unreliable, the ALJ must make a credibility
5 determination with findings sufficiently specific to permit the
6 court to conclude the ALJ did not arbitrarily discredit claimant's
7 allegations. *Bunnell v. Sullivan*, 947 F.2d 341, 345-46 (9th Cir.
8 1991) (en banc). The ALJ may consider the following factors when
9 weighing the claimant's credibility: the claimant's reputation for
10 truthfulness, inconsistencies either in his allegations of
11 limitations or between his statements and conduct, his daily
12 activities and work record, and testimony from physicians and third

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14 ² For reasons unexplained by the ALJ or Plaintiff's
15 representative, it appears Plaintiff was not given an opportunity to
16 testify fully at the February 15, 2005, hearing. Rather, the ALJ
17 interrupted Plaintiff's attempt to answer the ALJ's first question
18 to take testimony from medical expert Scott Mabee, Ph.D. (Tr. 383.)
19 Although the hearing transcript indicates Plaintiff's representative
20 intended to present testimony, no further examination of Plaintiff
21 was made by either the ALJ or Plaintiff's representative. (Tr. 391-
22 92.) On remand, the Plaintiff will be given the opportunity to
23 testify and respond to examination by his representative and the
24 ALJ. 20 C.F.R. §§ 405.1(b)(2), 405.320(a), 405.350; see also SSR
25 79-19 (disability issues "may best be resolved on the basis of
26 detailed testimony as to the individual's activities, background,
27 experience, etc. presented at the hearing.") If Plaintiff chooses
28 to testify on remand, new credibility findings may be necessary.

1 parties concerning the nature, severity, and effect of the alleged
2 symptoms. *Light v. Social Sec. Admin.*, 119 F.3d 789, 792 (9th Cir.
3 1997). If the ALJ's credibility finding is supported by substantial
4 evidence in the record, the court may not engage in second-guessing.
5 See *Morgan*, 169 F.3d at 600. If there is no affirmative evidence
6 that the claimant is malingering, the ALJ must provide "clear and
7 convincing" reasons for rejecting the claimant's allegations
8 regarding the severity of symptoms. *Reddick v. Chater*, 157 F.3d 715,
9 722 (9th Cir. 1998).

10 Here, in his credibility findings, the ALJ referenced evidence
11 in the record of Plaintiff's poor work record, his history of
12 quitting jobs for reasons unrelated to his alleged disability,
13 statements to his doctors that he did not want to work because his
14 wages would be garnished, and his interest in supporting himself
15 with benefits. (Tr. 19.) These reasons are "clear and convincing"
16 and amply supported by the record. (Tr. 137, 157, 166, 239-40,
17 273.) In addition, the record includes evidence that for several
18 years, Plaintiff denied his long-term drug use to treating medical
19 providers, but later admitted to past heavy use and reported he
20 still used marijuana "when he can obtain it." (Tr. 167, 239.) He
21 ultimately admitted to his treating nurse practitioner, Nora Cross,
22 that he had never tried giving up cannabis use before December 2003.
23 (Tr. 277-78.) He reported to examining psychiatrist Julie Janssen,
24 M.D., that he hated working and, in the past, had faked a disability
25 to get a disabled parking permit. (Tr. 166.) He also reported he
26 was a drug dealer in Hawaii and had a significant history of heavy
27 methamphetamine and cocaine use. (Tr. 240, 271.) Although this
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1 drug use was discontinued, his involvement in these illegal
2 activities reflects on Plaintiff's truthfulness. Further, Plaintiff
3 consistently failed to take his anti-depressant medications as
4 prescribed, (Tr. 157, 167, 273, 280), and reported to Nurse Cross
5 that he was hesitant to move into subsidized housing because "he
6 would be pressured into working." (Tr. 273.) The ALJ did not err
7 in finding Plaintiff's allegations "not credible."

8 **B. Medical Opinions**

9 Plaintiff claims the ALJ improperly rejected the assessment of
10 Plaintiff's mental functional capacity by Peter Gobar, M.D., in
11 favor of the opinions of examining psychologist Thomas Rowe, Ph.D.,
12 and the agency reviewing physicians. (Ct. Rec. 13 at 7.) Plaintiff
13 also asserts the combination of moderate limitations included in Dr.
14 Rowe's assessment constitute sufficient evidence to support a
15 finding of disability. (Id. at 9-10.)

16 In a disability proceeding, it is the role of the ALJ to
17 resolve conflicts in medical evidence. A treating physician's
18 opinion is given special weight because of his familiarity with the
19 claimant and his physical condition. See *Fair v. Bowen*, 885 F.2d
20 597, 604-05 (9th Cir. 1989). If the treating physician's opinion is
21 not contradicted, it can be rejected only with "clear and
22 convincing" reasons. *Lester v. Chater*, 81 F.3d 821, 830 (9th Cir.
23 1995). If contradicted, the ALJ may reject the opinion if he states
24 specific, legitimate reasons that are supported by substantial
25 evidence. See *Flaten v. Secretary of Health and Human Serv.*, 44 F.3d
26 1453, 1463 (9th Cir. 1995); *Fair*, 885 F.2d at 605. Furthermore, a
27 treating physician's opinion "on the ultimate issue of disability"

1 must itself be credited if uncontroverted and supported by medically
2 accepted diagnostic techniques unless it is rejected with "clear and
3 convincing" reasons. *Holohan v. Massanari*, 246 F.3d 1195, 1202-03
4 (9th Cir. 2001).

5 To meet this burden, the ALJ can set out a detailed and
6 thorough summary of the facts and conflicting clinical evidence,
7 state his interpretation of the evidence, and make findings.
8 *Thomas*, 278 F.3d at 957; *Magallanes v. Bowen*, 881 F.2d 747, 751 (9th
9 Cir. 1989). The ALJ is not required to accept the opinion of a
10 treating or examining physician if that opinion is brief, conclusory
11 and inadequately supported by clinical findings. *Id.*

12 Here, in assessing Plaintiff's RFC, the ALJ discussed Dr.
13 Gobar's report and found the limitations checked on the RFC form
14 were conclusory and inconsistent with Dr. Gobar's narrative report.
15 (Tr. 19, 321-24, 351-52.) These are legitimate reasons, supported
16 by substantial evidence, for discounting Dr. Gobar's conclusory
17 opinions. *Magallanes*, 881 F.2d at 751; *Crane v. Shalala*, 76 F.3d
18 251, 253 (9th Cir. 1996). The evidence shows that Dr. Gobar's form
19 report is not consistent his own treatment notes. For example, the
20 record includes two reports from Dr. Gobar, indicating he saw
21 Plaintiff once in December 2004 and once in January 2005, for
22 medication management. (Tr. 321-24.) In January 2005, Dr. Gobar
23 reported "in terms of overall functioning, doing activities of daily
24 living . . . he is not having any significant problems." He stated
25 Plaintiff was cooperative, friendly, alert with "fairly good"
26 concentration. (Tr. 323.) There is not substantial evidence in Dr.
27 Gobar's notes to support the "marked" limitations assessed in the
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1 February 2005 evaluation form. Further, treatment notes completed
2 by Nurse Cross, who saw Plaintiff routinely for several years, show
3 no such marked limitations. She observed positive responses to
4 medication once Plaintiff started taking it as prescribed and
5 refrained from cannabis use. In 2004, she also noted Plaintiff's
6 major depression as "in remission." (Tr. 273, 276, 281, 315-20.)
7 Finally, the ALJ's consideration of claimant's credibility in the
8 evaluation of medical evidence was appropriate. *Webb v. Barnhart*,
9 433 F.3d 683, 688 (9th Cir. 2005).

10 Although the ALJ concurred with Dr. Rowe's assessment of
11 moderate limitations, he failed to reject or accept a significant
12 number of moderate limitations found by Dr. Rowe and the state
13 agency physicians, whose opinions he found were consistent with his
14 RFC findings. (Tr. 19, 210-11.) This is legal error and cause for
15 remand. A review of the record indicates Dr. Rowe found Plaintiff
16 had numerous moderate limitations in: his ability to perform
17 activities within a schedule, maintain regular attendance and be
18 punctual within customary tolerances, sustain an ordinary routine
19 without special supervision, ask simple questions or request
20 assistance, accept instructions and respond appropriately to
21 criticism from supervisors, get along with coworkers or peers
22 without distracting them, and set realistic goals. (Tr. 17, 361-
23 62.) These were neither incorporated into the RFC findings, nor
24 rejected; therefore, Dr. Rowe's opinions are credited as a matter of
25 law. See *Lester*, 81 F.3d at 834. Because the ALJ failed to fully
26 account for these moderate limitations and assess their effect in
27 combination, the RFC findings are not supported by substantial

1 evidence. *Smolen v. Chater*, 80 F.3d 1273, 1290-91 (9th Cir. 1996)

2 **C. Step Four - Past Relevant Work**

3 At step four, after RFC findings are made, the ALJ determines
4 if a claimant can perform past relevant work. Although the burden
5 of proof lies with the claimant at step four, the ALJ still has a
6 duty to make the requisite factual findings to support his
7 conclusion. SSR 82-62. This is done by looking at the "residual
8 functional capacity and the physical and mental demands" of the
9 claimant's past relevant work. 20 C.F.R. §§ 404.1520(a)(4)(iv) and
10 416.920 (a)(4)(iv). Past relevant work is work performed in the
11 last 15 years, lasted long enough to learn it and was substantial
12 gainful employment. SSR 82-61. In finding that an individual has the
13 capacity to perform a past relevant job, the decision must contain
14 among the findings the following specific findings of fact:

15 1. A finding of fact as to the individual's residual
16 functional capacity;

17 2. A finding of fact as to the physical and mental demands of
18 the past job/occupation; and

19 3. A finding of fact that the individual's residual
20 functional capacity would permit a return to his or her past job or
21 occupation. SSR 82-62.

22 These findings must be based on the evidence in the record and
23 must be developed and fully explained in the disability decision.
24 Evidence of the physical and mental requirements of a particular job
25 may be found in the Dictionary of Occupational Titles (*DICOT*), other
26 administratively recognized publications, or vocational expert
27 testimony. SSR 82-61. Vocational experts are used most often at an
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1 ALJ hearing. SSR 00-4p. Step four requires specific findings on
2 all three points sufficient "to insure that the claimant really can
3 perform his past relevant work." *Pinto v. Massanari*, 249 F.3d 840,
4 845 (9th Cir. 2001); see also SSR 00-40.

5 As discussed above, the ALJ's RFC findings are not supported by
6 substantial evidence in that they did not include a number of
7 moderate non-exertional limitations found by Dr. Rowe which the ALJ
8 found persuasive. (Tr. 19.) Further, the ALJ did not make the
9 required "specific findings of fact" regarding Plaintiff's past work
10 as impacted by all of his limitations. The ALJ did not take
11 Plaintiff's testimony, and even though vocational expert Jill
12 Dempsey appeared at the hearing (Tr. 383), vocational expert
13 testimony regarding the physical or mental demands of Plaintiff's
14 past work as cook or nursery work was not presented. On remand, at
15 step four, and if necessary at step five, vocational expert
16 testimony would be appropriate, as there is unrejected medical
17 evidence of numerous moderate non-exertional limitations, the
18 combination of which may preclude past work. *Cooper v. Sullivan*,
19 880 F.2d 1152, 1156 (9th Cir. 1989).

20 The ALJ's conclusion that Plaintiff can do his past work as a
21 cook and nursery worker without reference to the *DICOT* or vocational
22 expert testimony is unsupported by substantial evidence in the
23 record. While it is not certain that Plaintiff will succeed in
24 proving he is disabled and entitled to disability insurance
25 benefits, because it is unclear from the record whether Plaintiff
26 can perform past work or other work in the national economy, remand
27 is appropriate. See *Harman*, 211 F.3d at 1178; *Smolen v. Chater*, 80

1 F.3d 1273, 1292 (9th Cir. 1996). Accordingly,

2 **IT IS ORDERED:**

3 1. Plaintiff's Motion for Summary Judgment (**Ct. Rec. 13**) is
4 **GRANTED**. This matter is remanded to the Commissioner for additional
5 proceedings pursuant to sentence four of 42. U.S.C. § 405(g) and the
6 decision above;

7 2. Defendant's Motion for Summary Judgment (**Ct. Rec. 15**) is
8 **DENIED**;

9 3. An application for attorney fees may be filed by separate
10 motion.

11 The District Court Executive is directed to file this Order and
12 provide a copy to counsel for Plaintiff and Defendant. Judgment
13 shall be entered for Plaintiff and the file shall be **CLOSED**.

14 DATED June 1, 2007.

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16 S/ CYNTHIA IMBROGNO
17 UNITED STATES MAGISTRATE JUDGE
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